

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





# 77-7008

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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ANASTASIA KANDELL,

*Plaintiff-Appellant,*

against

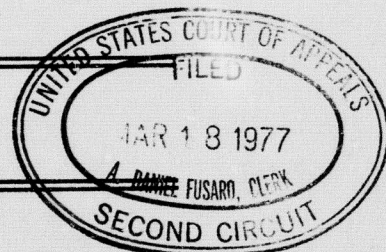
RAYDELL PUBLISHING AND DISTRIBUTING  
CORPORATION EMPLOYEES PENSION PLAN,

*Defendant-Appellee.*

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**APPELLANT'S BRIEF**

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## TABLE OF CONTENTS

|                                                                                                                                                                                                                  | Page |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Statement of the Issue Presented for Review                                                                                                                                                                      | 1    |
| Statement of the Case                                                                                                                                                                                            |      |
| Nature of Case and Proceedings Below                                                                                                                                                                             | 2    |
| The Facts                                                                                                                                                                                                        | 3    |
| Plaintiff's Exhibit 1                                                                                                                                                                                            | 4    |
| I - THE REQUIREMENT OF 4.04 OF THE PLAN<br>THAT A PARTICIPANT'S NORMAL RETIREMENT<br>BENEFIT BE BASED ON A FIVE YEAR AVERAGE<br>IS NOT TO BE APPLIED IN DETERMINING A<br>PRE-RETIREMENT DEATH BENEFIT            | 5    |
| II - THE EFFECT OF THE DISTRICT COURT RULING<br>IS TO ENRICH THE CORPORATION BY DEPRIV-<br>ING THE WIDOW AND DESIGNATED BENEFICIARY<br>OF THE DECEASED PARTICIPANT'S PORTION<br>OF THE AUXILIARY INVESTMENT FUND | 9    |
| CONCLUSION                                                                                                                                                                                                       | 11   |



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ANASTASIA KANDELL,

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- against -

RAYDELL PUBLISHING AND DISTRIBUTING  
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Defendant-Appellee.

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APPELLANT'S BRIEF

Plaintiff-appellant, Anastasia Kandell, appeals from a judgment entered on December 20, 1976, by the United States District Court for the Southern District of New York (Knapp, J.), dismissing plaintiff's action on the merits on tender of payment of \$8,700.00 from defendant to plaintiff (2a, 87a).

Statement of the Issue Presented for Review

The parties agree that plaintiff, as the widow of a participant of a qualified pension plan, is entitled to

the proceeds of the insurance policy - which she has already been paid - plus the deceased participant's actuarially adjusted portion of the Auxiliary Investment Fund. The sole issue presented to the District Judge for determination, and to this Court for review, is the proper method to be employed in computing the deceased participant's actuarially adjusted portion of the Fund.

#### Statement of the Case

##### Nature of Case and Proceedings Below

Plaintiff brought this action under the Employee Retirement Income Security Act of 1974, 88 Stat. 891; U.S.C., Title 29, §1132. She claims that there is due her, as the widow and named beneficiary of Irving Kandell, a participant of a qualified pension plan, the sum of \$17,562.00, representing his actuarially adjusted portion of the Auxiliary Investment Fund (Complaint, 3a-5a). In its answer (6a) defendant denies solely that there is due plaintiff the amount claimed by her. It is defendant's contention that there is only due her the sum of \$8,700.00 (8a), based upon the decedent's five highest consecutive years of earnings, and that amount defendant has tendered (79a-80a).



After a brief trial, the District Judge agreed with defendant's interpretation of the pension plan (81a) and rendered judgment (84a-85a) dismissing the action on the merits on defendant's tender of payment of \$8,700.00.

### The Facts

Irving Kandell and Raymond Lussa were the two sole officers and directors of the Raydell Publishing and Distributing Corporation and the sole two participants in its pension plan (79a). Kandell died on December 9, 1974, leaving plaintiff as his designated beneficiary (79a).

The pension plan, with the amendments (plaintiff's Exhibit 1, 51a-74a), was adopted on November 15, 1971 (36a), and took effect on that day (55a). November 15 of each year is the anniversary date of the plan (39a).

The plan, as amended, provides, among other things, that the death benefit shall be the full amount of any death benefit payable under a life insurance policy plus the deceased participant's actuarially adjusted portion of the Auxiliary Investment Fund (Exh. 1, 52a).

Upon the death of her husband, plaintiff was paid

the proceeds of his life insurance policy (5a) and was tendered by the Trustee of the pension plan the sum of \$8,700.00, based upon the decedent's five highest consecutive years of earnings (79a-80a). Plaintiff declined the tender claiming that she was entitled to \$17,562.00, based upon the decedent's last full year of earnings (79a-80a).

According to a letter submitted by the P.F.R. Planning, Inc., the agency involved in the establishing of the pension plan (31a-32a), "the reduction of benefits in Mr. Kandell's death created a large surplus in the separate investment fund. We have spread the surplus to Mr. Lussa's normal retirement date." (76a)

Plaintiff's Exhibit 1

The pension plan (Exh. 1, 51a-74a) consists of the following documents: the Adoption Agreement (55a-59a), the Guardian Life Variable Form Prototype Pension Plan and Trust Agreement ("the Plan") (60a-74a) and Amendments (52a-54a). Also included in Exhibit 1 is a letter of the Internal Revenue Service, dated January 30, 1973 (51a), determining that the plan, with the Amendments, is qualified under section 401 or 405 of the Internal Revenue Code. According



to this letter, the plan was both adopted and amended on November 15, 1971.

I

THE REQUIREMENT OF 4.04 OF THE PLAN  
THAT A PARTICIPANT'S NORMAL RETIREMENT  
BENEFIT BE BASED ON A FIVE YEAR AVERAGE  
IS NOT TO BE APPLIED IN DETERMINING A  
PRE-RETIREMENT DEATH BENEFIT

The pension plan represented by Exhibit 1 (51a-74a) is defined as a non-integrated split funded pension plan (11a). Such a plan is not integrated with Social Security (11a) and is a Combination Plan under which the benefits shall be funded by the purchase of ordinary life type policies and contributions to an Auxiliary Investment Fund (item 9, 58a), to be made by the employer (11a).

Pursuant to item 13.03 of the Plan (74a), the Trustees are required to "value the trust assets and liabilities annually as of each Anniversary Date [November 15] for the purpose of determining what contributions the Employer must make for the next subsequent Plan year." Thus, each and every year there is an actuarially determined

contribution by the employer to the Auxiliary Investment Fund. The effect of this is to provide a benefit identical with that of a fully insured plan.

Plaintiff's expert witness testified that, having ascertained that during the year 1974, which was the year when the deceased participant died, his monthly compensation was \$4,750.00 (11a-12a), and having analyzed Exhibit 1, the witness determined that the widow was entitled to \$117,562.00 as a pre-retirement death benefit (12a). Since she had been paid the proceeds of the insurance policy, amounting to \$100,000.00, he concluded that there was due her a balance of \$17,562.00, which was to be paid out of the Auxiliary Investment Fund (13a-14a).

He stated (12a-13a) that his determination was based upon the pension formula set forth in item 6.I of the Adoption Agreement, as amended (52a), and item 10 of the Adoption Agreement, as amended (52a), which directs that the death benefit shall be the full amount of any death benefit payable under a policy, plus the deceased participant's actuarially adjusted portion of the Auxiliary Investment Fund.

According to defendant's expert witness, his



recommendation that the amount due plaintiff was "8,700.00 - some odd dollars" (32a) was predicated on sections 4.04 and 4.06 of the Plan (33a-34a). Section 4.04 (65a) gives the formula for determining a participant's benefit at his Normal Retirement Date, and was not intended to be used in determining a pre-retirement death benefit. Section 4.06 (65a) fixes the formula for determining the amount of pre-retirement death benefit under (a) a Fully Insured Plan, which this is not, and (b) a Combination Plan, which this is. Under a Combination Plan, according to section 4.06, the pre-retirement death benefit is to be "as stated in the Adoption Agreement (see item 10)."

Simultaneously with the making of the Adoption Agreement, "a boilerplate kind of a document" (16a), item 10 thereof was amended to read as follows:

"The death benefit under this Plan shall be the full amount of any death benefit payable under a Policy plus the deceased Participant's actuarially adjusted portion of the Auxiliary Investment Fund. In no event shall the death benefit be greater than would be provided if this was a Fully Insured Plan." (52a)

In the face of the explicit and clear language of the amendment, it is unreasonable for the defendant to argue,

as the District Judge says it does (81a), "that the amendment serves only as a definition and direction to the actuary." The words "[t]he death benefit under this plan shall be..." constitute not merely a direction but a mandate. Furthermore, a direction to the actuary of a pension plan is made for the purpose of effecting an intended result; in this case, that "the death benefit under this Plan shall be the full amount of any death benefit payable under a Policy plus the deceased participant's actuarially adjusted portion of the Auxiliary Investment Fund."

In determining the effect to be given to the amendment of item 10 of the Adoption Agreement, it should be kept in mind that the Agreement is a part of the Plan (55a) and is "a boilerplate kind of a document" which had been previously approved by the Internal Revenue Service (16a), and that the Adoption Agreement and Amendments were made on the same day (Exh. 1, 51a).

The prefatory sentence of adoption number 4 (52a) reads: "the death benefit as set forth in item 10 of the Adoption Agreement is amended to read as follows:" (emphasis supplied). Confronted with the above, defendant's expert witness conceded, however reluctantly, that the



language of the amendment to item 10 of the Adoption Agreement in effect substituted the amendment for the original wording of item 10 (44a-46a).

In the opinion of the District Judge (81a-82a), "since the quoted sections are clearly intelligible and explicit with regard to the five year basis for the retirement benefit, we find it difficult to believe that if a different basis were intended for the death benefit, the pertinent provisions would not have been equally intelligible and explicit." With all due respect, it would appear to be more difficult to believe that if the same five year basis were intended for the retirement benefit and for the pre-retirement death benefit, the language of section 4.04 (65a) would have so clearly and explicitly limited the five year basis to a participant's normal retirement benefit.

## II

THE EFFECT OF THE DISTRICT COURT  
RULING IS TO ENRICH THE CORPORATION  
BY DEPRIVING THE WIDOW AND DESIGNATED  
BENEFICIARY OF THE DECEASED PARTICIPANT'S  
PORTION OF THE AUXILIARY INVESTMENT FUND

As of November 15, 1974, the anniversary date

immediately preceding the death of the participant, there was, or should have been, in the Auxiliary Investment Fund the sum of \$17,562.00 as the deceased participant's portion of the Fund. Pursuant to the amendment to item 10 of the Adoption Agreement, this amount is payable as a death benefit.

The effect of the judgment entered in the District Court dismissing the action on tender of \$8,700.00 is to deny to the deceased participant's widow and named beneficiary the sum of \$8,862.00 which is legally and morally payable to her, and to enrich the corporation by that amount. As was admitted by the agency involved in establishing the pension plan, "the reduction of benefits in Mr. Kandell's death created a large surplus in the separate investment fund. We have spread the surplus to Mr. Lussa's normal retirement date." (76a)

What the letter in effect says is that there was \$17,562.00 in the Fund allocated to the deceased participant at the time of his death and that by paying out only \$8,700.00 there was a surplus of \$8,862.00, which was then applied to the other participant's normal retirement date, thus reducing the future contributions to the Fund to be made by the employer.



A judgment which takes from the beneficiary of a deceased participant to give to the employer is clearly in violation of the Trustee's responsibility to maintain the benefits of the plan for the participants and their beneficiaries and offends the basic concepts underlying pension legislation which, while granting tax benefits to the employer, is primarily intended and designed for the benefit of the participants and their beneficiaries, and not for the enrichment of the employer.

#### CONCLUSION

For the reasons stated above, it is respectfully urged that the judgment entered herein be reversed and that a judgment be entered in favor of plaintiff in the sum of \$17,562.00 and that plaintiff be awarded a reasonable counsel fee.

Respectfully submitted,

ENGLANDER and ENGLANDER  
Attorneys for Plaintiff-Appellant

of Counsel:  
Herman Englander

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SERVICE OF THREE (3) COPIES OF THE WITHIN

*Brief*

IS HEREBY ADMITTED

THIS 18 DAY OF March 1977

*Arthur J. Roth*

Attorney(s) for

*Self*